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No. 84-483

IN THE

Supreme Court of the United States

October Term, 1984

ARKANSAS PUBLIC SERVICE COMMISSION; ROBERT E. JOHNSTON, COMMISSIONER; PATRICIA S. QUALLS, COMMISSIONER; and JAMES W. DANIEL, COMMISSIONER:
Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *ET AL.*, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION

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The parties joining in this Motion and Brief as amici curiae are as follows:

The National Association of Regulatory Utility Commissioners (NARUC);

The Public Service Commission of West Virginia;

The Maine Public Utilities Commission;

The Connecticut Department of Public Utility Control;

The Florida Public Service Commission;

The Citizens of the State of Florida;

The National Association of State Utility Consumer Advocates;

The Kansas State Corporation Commission;

The Minnesota Department of Public Service;

The People of the State of California and the Public Utilities Commission of the State of California;

The Louisiana Public Service Commission;

The Public Utilities Commission of Ohio;

The Iowa State Commerce Commission;

The Wisconsin Public Service Commission;

The Michigan Public Service Commission;

The Kentucky Public Service Comission;

The Washington Utilities and Transportation Commission;

The Consumer Advocate for the State of South Carolina; and

The Ohio Office of the Consumers' Counsel.

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The National Association of Regulatory Utility Commissioners (NARUC); the Public Service Commission of West Virginia; the Maine Public Utilities Commission; the Connecticut Department of Public Utility Control; the Florida Public Service Commission; the Citizens of the State of Florida; the National Association of State Utility Consumer Advocates (NASUCA); the Kansas State Corporation Commission; the Minnesota Department of Public Service; the People of the State of California and the Public Utilities Commission of the State of California; the Louisiana Public Service; the Public Utilities Commission of Ohio; the Iowa State Commerce Commission; the Wisconsin Public Service Commission; the Michigan Public Service Commission; the Kentucky Public Service

Commission; the Washington Utilities and Transportation Commission; the Consumer Advocate for the State of South Carolina; and the Ohio Office of the Consumers' Counsel hereby respectfully move for leave to file the accompanying brief as amici curiae. The written consent of petitioners the Arkansas Public Service Commission, *et al.* have been obtained and filed with the Clerk of the Court. Respondent Southwestern Bell Telephone Company has refused consent.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the District of Columbia, the Virgin Islands and Puerto Rico, engaged in the regulation of utilities and carriers. More specifically, the NARUC contains the State officials charged with the duty of regulating telecommunications within their respective borders. The NARUC, in its capacity as the representative of the State regulatory utility commissions, participated in the Eighth Circuit in this case as an amicus curiae.

The Public Service Commission of West Virginia, the Maine Public Utilities Commission, the Connecticut Department of Public Utility Control, the Florida Public Service Commission, the Kansas State Corporation Commission, the California Public Utilities Commission, the Louisiana Public Service Commission, the Public Utilities Commission of Ohio, the Iowa State Commerce Commission, the Wisconsin Public Service Commission, the Michigan Public Service Commission, the Kentucky Public Service Commission and the Washington Utilities and Transportation Commission are administrative agencies established under the constitution and laws of their respective States. Among their duties, these State agencies are statutorily required to regulate the intrastate rates and services of telecommunications service providers operating within their borders. Under their statutory provisions, each State utility agency seeks to ensure that intrastate telecommunications service providers operate in the public interest by providing service at rates and charges that are just and reasonable.

The Minnesota Department of Public Service is an independent agency whose purpose it is to represent the interests of all residential and business classes in the State of Minnesota in State and Federal proceedings involving telephone matters.

The citizens of the State of Florida are represented by the Public Counsel of the State. The Public Counsel is authorized, under Chapter 350 of the Florida Statutes, to represent Florida's consumers in all public utility proceedings before State and federal agencies, commissions and courts. NASUCA is a national organization whose membership consists of thirty-six State public utility consumer advocates, including sections of State attorney generals' offices and a citizens' utility board. The Consumer Advocate for the State of South Carolina and the Ohio Office of the Consumers' Counsel are both members of NASUCA.

The decision of the Court of Appeals for the Eighth Circuit which petitioners seek to have reviewed concerns the validity of a decision of the Federal Communications Commission which preempts the States from the exercise of authority over intrastate depreciation rate prescription. Amendment of Part 31, *Memorandum Opinion and Order*, 92 FCC2d 864 (1983). Because the authority to prescribe intrastate depreciation rates is crucial to the ability of the States to discharge their statutorily-imposed duty to ensure that intrastate telecommunications service is provided at rates and charges that are just and reasonable, the NARUC, State utility agencies and utility consumer representatives joining in this motion and brief have a strong interest in this case. The NARUC, *et al.*, believe that the brief they are requesting permission to file may or will present the Court with an understanding of the great importance of this issue to them.

The NARUC, *et. al.*, believe that a brief representing the joint views and perspective of two national organizations, thirteen State utility commissions and four consumer representatives on the importance of the issues involved may or will aid the Court in deciding whether to grant review in this case.

In sum, the issues involved in this case have nationwide impact which should justify the participation of the parties affected hereby. Therefore, the NARUC, *et al.*, respectfully request that this brief be accepted for filing.

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JOINT BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *ET. AL.*, AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The National Association of Regulatory Utility Commissioners; the Public Service Commission of West Virginia; the Maine Public Utilities Commission, the Connecticut Department of Public Utility Control; the Florida Public Service Commission; the Citizens of the State of Florida; the National Association of State Utility Consumer Advocates; the State Corporation Commission of Kansas; the Minnesota Department of Public Service; the People of the State of California and the Public Utilities Commission of the State of California; the Louisiana Public Service Commission; the Public Utilities Commission of Ohio; the Iowa State Commerce Commission; the Wisconsin Public Service Commission; the Michigan Public Service Commission; the Kentucky Public Service Commission; the Washington Utilities and Transportation Commission;

the Consumer Advocate for the State of South Carolina; and the Ohio Office of the Consumers' Counsel hereby submit their joint brief as amici curiae in support of the petition for writ of certiorari filed by the Arkansas Public Service Commission, *et al.*, seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in *Southwestern Bell Telephone Company v. Arkansas Public Service Commission et al.*, attached as A-43 to the petition for writ of certiorari filed herein. Pursuant to Rule 36 of the Rules of this Court, a written motion for leave to file this brief is attached hereto.

INTEREST OF AMICI

The decision of the Eighth Circuit which petitioner the Arkansas PSC seeks to have overturned is just one in a group of cases dealing with intrastate depreciation preemption which are of vital concern to State regulators and consumer representatives. The ability of the State utility agencies to discharge their statutorily-imposed duty to regulate intrastate telecommunications in the public interest by setting rates and charges that are just and reasonable is severely impacted by the FCC's preemptive action. What follows is a brief description of the other cases dealing with this issue in which the States and consumer organizations are involved.

I. Fourth Circuit Proceedings Challenging FCC Order

On February 15, 1983, the Virginia State Corporation Commission filed a petition for review before the U.S. Court of Appeals for the Fourth Circuit, seeking review of the FCC's preemption decision. (A-1).

On June 18, 1984, the United States Court of Appeals for the Fourth Circuit upheld the FCC. *Virginia State Corp. Commission v. Federal Communications Commission*, 737 F.2d 388 (4th Cir. 1984). Petitions for Rehearing En Banc were denied by the Court by Order issued October 3, 1984. Petitions for Writ of

Certiorari are expected to be filed with this Court within the statutory period.

II. Ohio Supreme Court Proceedings

On March 9, 1983, the Ohio Public Utilities Commission issued an order setting Cincinnati Bell Telephone Company's intrastate rates. Cincinnati Bell appealed this order to the Ohio Supreme Court asserting, *inter alia*, that the Ohio PUC erred in setting its intrastate rates based on its own and not the FCC's depreciation methodology.

On July 25, 1984, the Ohio Supreme Court upheld the Ohio Commission's decision. The Ohio Court held that the Commission was not bound by the principles of res judicata and hence not obligated to follow the FCC's rulemaking decision. Secondly, the Ohio Court found that the decision by the Ohio PUC was both reasonable and lawful based upon Ohio statutory dictates. *Cincinnati Bell Telephone Co. v. Ohio Public Utilities Commission,* 12 Ohio St. 3rd 280 (1984). That same day, Cincinnati Bell filed a notice of appeal to this Court. Cincinnati Bell's jurisdictional statement was filed with this Court on October 16, 1984.

III. First Circuit Proceedings

In response to an April 26, 1983 order of the Maine Public Utilities Commission, New England Telephone Company filed an action in the U.S. District Court for the District of Maine under 47 U.S.C. § 401(b) seeking to have the Maine Commission set intrastate rates in conformance with the FCC's depreciation methodology. The District Court issued an injunction requiring the Maine Commission to set intrastate rates in conformance with the FCC's wishes. *New England Telephone Co. v. Public Utilities Commission of Maine,* 570 F.Supp. 1558 (D.Me. 1983).

The Maine Commission appealed and, on June 29, 1984, the U.S. Court of Appeals for the First Circuit overturned the District Court's decision. The Court held that the FCC's order

was issued as a product of a rulemaking proceeding and did not constitute an "order" under 47 U.S.C. § 401(b). *New England Telephone Co. v. Public Utilities Commission of Maine*, No. 83-1779 (1st Cir. June 29, 1984). (A-56). A rehearing petition was denied by the Court by order dated September 10, 1984.

IV. Second Circuit Proceedings

On August 11, 1983, the Public Service Board of Vermont declined to increase intrastate rates of the New England Telephone and Telegraph Company to recover depreciation expense according to the FCC's depreciation methodology. The Company filed a motion for temporary injunction pursuant to 47 U.S.C. § 401(b) with the U.S. District Court for the District of Vermont. On December 14, 1983 the Court entered its order denying the injunction, finding that the Board was not a "person" under 47 U.S.C. § 401(b). *New England Telephone and Telegraph Co. v. Public Service Board of Vermont,* 576 F.Supp. 490 (D. Vt. 1984).

The Company filed an appeal with the U.S. Court of Appeals for the Second Circuit, which is pending at this time. *New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, No. 84-7051 (2nd Cir. filed June 27, 1984).

V. Fourth Circuit Proceedings Involving Maryland PSC

On February 18, 1983, the Maryland Public Service Commission declined to apply the FCC's depreciation methodology in setting the Chesapeake and Potomac Telephone Company's intrastate rates. On April 17, 1983, pursuant to suit brought under 47 U.S.C. §401(b) by the Company, the U.S. District Court for the District of Maryland issued an order requiring the Maryland Commission to increase the Company's intrastate rates in accordance with the FCC's methodology. *Chesapeake and Potomac Telephone Co. of Maryland v. Maryland Public Service Commission,* 560 F.Supp. 844 (D. Md. 1983).

An appeal to the U.S. Court of Appeals for the Fourth Cir-

cuit was filed by the Maryland PSC on May 3, 1983. *Chesapeake and Potomac Telephone Co. of Maryland v. Maryland Public Service Commission,* No. 83-1403 (4th Cir. filed May 3, 1983). A decision is pending.

VI. Fifth Circuit Proceedings

On May 19, 1983, the Louisiana Public Service Commission denied a request for increased rates filed by South Central Bell Telephone Company. South Central Bell filed a motion for preliminary injunction, pursuant to 47 U.S.C. §401(b), with the U.S. District Court for the Middle District of Lousiana seeking an increase in rates in conformance with the FCC's depreciation methodology.

The Court granted the injunction, directing the Commission to set rates sufficient to recover the intrastate revenue requirement associated with the FCC's depreciation methodology. *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* 557 F.Supp. 227 (M.D. La. 1983).

An appeal to the Fifth Circuit was filed and on October 11, 1984 the Court issued its decision upholding the issuance of the injunction. *South Central Bell Tel. Co. v. Louisiana Public Service Commission,* No. 83-3494 (5th Cir. Oct. 11, 1984)

VII. Seventh Circuit Proceedings

On December 22, 1983, the Wisconsin Public Service Commission issued an order determining the intrastate rates of Wisconsin Bell, Inc. The Company filed a motion for a preliminary injunction in the U.S. District Court for the District of Wisconsin seeking to compel the Commission to increase its intrastate rates in conformance with the FCC's depreciation methodology. A decision by the Court is pending. *Wisconsin Bell, Inc. v. Public Service Commission of Wisconsin,* No. 84-C-0004 (D. Wisc. filed Jan. 4, 1984).

VIII. Eighth Circuit Proceedings Involving Iowa SCC

On October 4, 1983, the Iowa State Commerce Commission issued an order denying Northwestern Bell Tel. Co.'s request for increased rates based on use of the FCC's depreciation methodology.

The Company filed a motion for a permanent injunction with the U.S. District Court for the Southern District of Iowa, pursuant to 47 U.S.C. §401(b). On September 27, 1984 the Court issued a permanent injunction against the Iowa SCC. *Northwestern Bell Tel. Co. v. Iowa State Commerce Commission,* No. 83-688-A (S.D. Iowa Sept. 27, 1984).

IX. Ninth Circuit Proceedings

On February 10, 1983, the Washington Utilities and Transportation Commission issued an order declining to increase the intrastate rates of Pacific Northwest Bell Telephone Company in conformance with the FCC's depreciation methodology.

Pacific Northwest Bell filed suit in the U.S. District Court for the Western District of Washington seeking to have its intrastate rates set in conformance with the FCC's decision. The Court issued a preliminary injunction on March 10, 1983. *Pacific Northwest Bell Telephone Company v. Washington Utilities and Transportation Commission,* 565 F.Supp. 17 (W.D. Wash. 1983).

The Washington UTC appealed to the U.S. Court of Appeals for the Ninth Circuit. That appeal is pending. *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Commission,* No. 83-3746 (9th Cir. filed April 19, 1983).

X. Tenth Circuit Proceedings

On March 23, 1983, the Kansas State Corporation Commission rejected Southwestern Bell Telephone Company's request for increased rates to reflect FCC approved depreciation methods.

Southwestern Bell filed a motion for a preliminary injunction with the U.S. District Court for the District of Kansas. On April 8, 1983 the Court issued the requested injunction pending final judicial review of the FCC's depreciation rule. *Southwestern Bell Telephone Co. v. State Corporation Commission of Kansas,* No. 83-4090 (D. Kan. April 8, 1983).

SUMMARY OF ARGUMENT

The threshold issue raised by Arkansas in its petition for writ of certiorari is whether, under section 401(b) of the Communications Act of 1934, a federal district court may deny enforcement of an FCC decision because it finds that the FCC has acted outside the scope of its authority in issuing the decision. Amici NARUC, *et al.,* believe that a district court does retain its equitable powers under 47 U.S.C. §401(b) to go beyond the express language of an enforcement statute, especially where, as here, the public interest is involved.

Furthermore, Amici NARUC, *et al.,* believe that the District Court below properly exercised its equitable powers to deny enforcement of the FCC's depreciation preemption decision. In issuing its decision the FCC acted outside the scope of its statutory authority under the Communications Act of 1934. Section 220(b) of the Act, which the FCC cites as authority for its ruling, does not grant it this authority. Moreover, the former Bell System Operating Companies to whom its decision applies are now "connecting carriers" within the meaning of 47 U.S.C §152(b)(2), and, as such, are not subject to FCC jurisdiction as to their ratemaking function. Additionally, the FCC has failed to justify its preemption on the ground that it was necessary to avoid frustration of a valid federal purpose.

Finally, there is a conflict among the circuit courts of appeal as to whether the FCC's decision is enforceable by private parties under 47 U.S.C. §401(b). Amici NARUC, *et al.,* agree with the Court of Appeals for the First Circuit that only adjudicatory "orders" and not "rules" may be enforced by private parties under 47 U.S.C. § 401(b) and that the FCC's depreciation deci-

sion constitutes an unenforceable "rule" within the meaning of the Administrative Procedure Act, 47 U.S.C. § 551(4).

ARGUMENT

a. The decision of the court below conflicts with decisions of this Court recognizing that federal district courts retain equity jurisdiction, under enforcement statutes, to deny enforcement of agency decisions.

Broadly stated, the issue raised by this case is whether a federal district court may invoke its inherent power as an equity court to avoid what it deems to be an inequitable result. More specifically, the issue is whether, under §401(b) of the Communications Act, 47 U.S.C. §401(b), a federal district court may deny enforcement of a Federal Communications Commission decision because it finds that the FCC has acted outside the scope of its statutory authority in issuing the decision.

This is a case of first impression for this Court. The proper construction of §401(b) has never been presented to this Court for review. The U.S. District Court for the Eastern District of Arkansas determined that §401(b) did grant its discretion to deny enforcement. (A-36).[1] That court then proceeded to dismiss plaintiff Southwestern Bell's suit under §401(b) because it found that the FCC did not have the statutory authority to issue the decision which Southwest Bell sought to have enforced. (A-36). Upon review, the Court of Appeals for the Eighth Circuit reversed, finding that "[t]he district court had no jurisdiction to deny enforcement of the FCC order on the basis that it was ultra vires." (A-52). Amici NARUC, *et al.*, submit that the Court of Appeals erred and that application of the principles enunciated by this Court in cases construing enforcement provisions very similar to §401(b) leads to the inescapable conclusion that under §401(b) a district court retains its equitable

[1]References are to the Appendix attached to Arkansas' Petition for Writ of Certiorari.

powers and may properly deny enforcement of an FCC decision.

Hecht v. Bowles, 321 U.S. 321, 88 L.Ed. 754, 64 S.Ct. 587 (1944), is a compelling precedent for this case. At issue in *Hecht* was the construction of the enforcement provision contained in the Emergency Price Control Act of 1942.

The Act's Administrator argued that, having established that a defendant had engaged in acts or practices violative of §4 of the Act, he was entitled as of right to an injunction restraining the defendant from engaging in such acts or practices. In deciding the case, this Court rejected the Administrator's argument and held that there was "some room for the exercise of discretion on the part of the Court." 321 U.S. at 328. After noting that §205(a) provided that an injunction "shall be granted" against a violation, this Court stated that "[a] grant of jurisdiction to issue compliance hardly suggests an absolute duty to do so." *Id.* at 329-330. It emphasized the fundamental character of equity jurisdiction in interpreting §205(a) to

> afford a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practice, as conditioned by the necessities of the public interest which Congress has sought to protect.
>
> *Id.* at 330.

Cases interpreting the enforcement provision contained in the Freedom of Information Act (FOIA), 5 U.S.C. §552 (a)(4)(B), also have granted district courts the discretion to refuse enforcement. In dealing with a request for presidential records under the FOIA, the U.S. Court of Appeals for the D.C. Circuit stated that the District Court "ha[d] the equitable power to protect Mr. Nixon's constitutional interests." *Reporters Committee for Freedom of the Press v. Sampson,* 591 F.2d 944, 949 (D.C. Cir. 1978). In deciding upon a request for disclosure of deleted portions of the transcript of a background press conference held by a former Secretary of State, the same court stated that an

injunction should be denied if the district court determined that release of the material would do damage to the national security. *Halperin v. Dept. of State,* 565 F.2d 699 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1046 (1978). *See also Doyle v. U.S. Department of Justice,* 494 F.Supp. 842, 845 (D.D.C. 1980), *aff'd,* 668 F.2d 1365 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 1002 (1982). These lower court cases acknowledged and applied the principles enunciated by this Court in *Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 39 L.Ed.2d 123, 94 S.Ct. 1028 (1974). In *Renegotiation Board* this Court stated:

> With the express vesting of equitable jurisdiction in the district court by §552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.
>
> 415 U.S. at 20.

This Court has noted that it is especially important to allow a district court the discretion to go beyond the express language of an enforcement statute when the public interest is involved, as it is in this case. In *United States v. First National City Bank,* 379 U.S. 378, 13 L.Ed.2d 365, 85 S.Ct. 528 (1965), a case involving the enforcement provision of the Internal Revenue Code, 26 U.S.C. §7402(a), this Court stated that

> courts of equity may and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.

378 U.S. at 383 *quoting Virginian R. Co. v. Federation,* 300 U.S. 515, 552 (1937).

Application of the principles outlined above to this case leads to the conclusion that the district court has discretion in considering whether to grant enforcement. In furtherance of this discretion it may properly consider objections to the validity of the FCC's order. As a court of equity in an enforcement proceeding, it is not precluded from scrutinizing the order sought to

be enforced to determine whether the FCC has traveled outside the scope of its authority. *Leedom v. Kyne,* 358 U.S. 184, 3 L.Ed.2d 210, 79 S.Ct. 180 (1958). An agency may not bootstrap itself into an area in which it has no jurisdiction by violating its statutory mandate. *Federal Maritime Commission v. Seatrain Lines, Inc.,* 411 U.S. 726, 745, 36 L.Ed.2d 620, 93 S.Ct. 1773 (1973).

The Eighth Circuit's rejection of the District Court's equity jurisdiction must not be allowed to stand.

b. The decision below involves an important question of federal law which should be settled by this Court.

The gravamen of petitioner Arkansas' dispute with Southwestern Bell is that the FCC acted outside the scope of its authority under the Communications Act of 1934 in preempting the authority of the States to prescribe depreciation rates for intrastate ratemaking purposes. The FCC based its decision to preempt on §220(b) of the Communications Act, 47 U.S.C. §220(b). But, as the District Court below properly determined, §220(b) does not grant it this authority. (A-36).

Section 220(b) does not explicitly or implicitly preempt State prescription of depreciation rates. Nothing in §220(b) directs State commissions to take any particular action with respect to depreciation and accounting. The authority explicitly granted to the FCC under section 220(b) is limited solely to regulation of interstate communications. On the other hand, explicit provisions of section 2(b) of the Communications Act of 1934, 47 U.S.C. §152(b), explicitly deny the FCC jurisdiction over

> charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. 47 U.S.C. § 152(b).

Hence, by explicit statutory provision, the FCC can prescribe depreciation rates for interstate ratemaking purposes, but is precluded from prescribing depreciation rates for intrastate

ratemaking purposes. Intrastate ratemaking authority is reserved to the States.

A review of the legislative history of Section 220 confirms that Congress did not intend to displace State authority over depreciation and accounting. In fact, the contrary is true. The entire Communications Act of 1934, including §220, was perceived as supplementing, rather than supplanting, State authority. *See Hearings on S.2910 Before the Senate Committee on Interstate Commerce,* 73rd Cong., 2d Sess. 155, 156 (March 14, 1934); *see also* 78 Cong. Rec. 8823 (1934).

Section 220(b) was derived from §20(b) of the Interstate Commerce Act. *See* S. Rept. No. 781, 73rd Cong., 2d Sess. 5 (1934); H.R. Rept. No. 1850, 73rd Cong., 2d Sess. 3, 7 (1934). The primary purpose of that section was to deal with problems associated with railroad regulation and not to preempt State prescription of depreciation rates. *See* H.R. Rept. No. 450, 66th Cong., 1st Sess. 10-11 (1919). Indeed, subsequent Interstate Commerce Commission practice did not preempt State prescription of depreciation and accounting practices. Instead, the ICC acknowledged its dependence upon State regulation of telephone companies for *interstate* depreciation and accounting purposes. *See Depreciation Charges of Telephone Companies,* 118 I.C.C. 195, 374-375 (1926).

A reading of subsection (j) of §220 also bears out the view that Congress did not intend to limit the intrastate ratemaking authority of the States by preempting inconsistent State depreciation and accounting prescriptions. Subsection (j) calls upon the FCC to investigate and to report to Congress on the need for legislation to "define further or harmonize the powers of the Commission and of the State commissions with respect to matters to which this section relates." If Congress had intended the FCC to preempt inconsistent State prescribed depreciation rates, no Congressional action would be required to harmonize State and federal powers. By enacting subsection (j) Congress made it clear that, through the further enactment of legislation,

it would be the final arbiter of any disputes between States and the FCC arising under §220. By preempting State authority over depreciation rates, the FCC has improperly substituted its judgment for that of Congress in resolving disputes over the jurisdictional scope of §220.

The FCC also concluded that even if §220 did not provide it with the statutory authority to preempt, preemption was still justified in this case to avoid the frustration of a validly adopted federal purpose under principles laid down in *North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir.), *cert. denied,* 429 U.S. 1027 (1976) (*NCUC I*). In that case the Fourth Circuit upheld the FCC's conclusion that States may not regulate the interconnection of customer-provided equipment in any way that conflicts with the FCC's regulation in the area. *NCUC I* was expanded in *Computer & Communications Industry Ass'n v. FCC,* 693 F.2d 198 (D.C. Cir.), *cert. denied,* 103 S.Ct. 2109 (1983) (*Computer II*), where the issue involved the deregulation of customer-provided equipment.

The FCC's reliance on *NCUC* and *Computer II* is misplaced. Those cases involved a subject matter and a conflict very different from that which exists here. They concerned the impossibility of complying with both State and federal regulatory schemes. Here, the FCC has preempted not because of impossibility but in order to overcome a perceived obstacle to a federal goal. Indeed, as noted by the Court of Appeals for the Fourth Circuit, "the instant appeal raises no question of actual physical impossibility of complying with dual federal and State regulation." *Virginia SCC,* 737 F.2d at 396.

Those cases involved FCC regulation of plant and facilities used interchangeably for intrastate and interstate communications. Preemption was necessary because dual regulation was impossible. But what is at issue in this case is the right of each State to prescribe depreciation practices in an intrastate ratemaking context relating to plant costs already divided and allocated to the intrastate jurisdiction for recovery. Preemption in this context is unjustifiable.

Furthermore, the Modified Final Judgment (MFJ) and the Reorganization of the Bell System effected in *United States v. Western Electric Co.*, No. 82-0192 (D.D.C. 1982) fundamentally altered the nature of the Bell Operating Companies' (BOCs) business and altered their jurisdictional status under the Communications Act. By divesting them of assets used jointly for interstate toll and exchange services and limiting them solely to intrastate, exchange operations, the MFJ changed the BOCs from "common carriers" subject to the Act in various ways, to "connecting carriers" which are not subject to the Communications Act or the jurisdiction of the FCC, except for specific limited purposes not relevant to their ratemaking function.

The purpose of the MFJ and the Reorganization was to sever AT&T's control over the BOCs and their "bottleneck" exchange facilities. This was accomplished by AT&T's divestiture of stock ownership in the BOCs and the division of assets which divested the BOCs of all assets, facilities, personnel and rights to technical information except those necessary for the BOCs to perform exchange telecommunications functions. *United States v. Western Electric Co.*, 552 F.Supp. 131, 200-201 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983).

The separation of assets of the Bell System companies performing exchange functions and those performing interexchange functions coincides with the jurisdictional division in the Communications Act between "common carriers" and "connecting carriers." A "common carrier" under the Act is defined at 47 U.S.C. §153(h) as "any person engaged as a common carrier by wire, interstate or foreign communications by wire or in interstate or foreign transmission of energy, except where reference is made to common carriers not subject to the Act." A "common carrier not subject to the Act" is a "connecting carrier" defined at 47 U.S.C. §§153(u) and 152(b)(2-4) as, *inter alia:*

> (2) any carrier engaged in interstate or foreign communication solely through physical connection with

> the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . .
>
> 47 U.S.C. §152(b)(2).

The BOCs, having been limited by the MFJ to performing exchange and exchange access functions, are engaged in interstate and foreign communications "solely through physical connection with the facilities of another carrier." There is no common direct or indirect control with a common carrier by virtue of AT&T's relinquishment of stock ownership and other devices of control. They are therefore "connecting carriers."

The relegation of BOCs to the status of "connecting carriers" has important jurisdictional consequences. "Connecting carriers" are subject only to §§201 through 205 of the Communications Act "except as otherwise provided therein." They are not subject to §220, the section upon which the FCC based its authority to set intrastate depreciation rates. Consequently, the FCC's decision exercising authority to govern the depreciation rates used by these companies is without statutory basis and must be rejected.

c. This case should be reviewed by this Court because it presents a conflict in decisions rendered by two courts of appeal.

There is a conflict among the circuit courts of appeal on the issue of whether the FCC's preemption decision is enforceable by private parties under 47 U.S.C. §401(b). The Eighth Circuit held that the ruling could be enforced by private parties as a self-executing order of an administrative agency. In a later decision, the First Circuit cited the Eighth Circuit's decision and expressly declined to follow it, stating:

> [N]one of the courts granting injunctions, aside from the district court below, have directly addressed the question the Maine Public Utilities Commission has raised here: whether the FCC's decision constitutes an

> "order" in the contemplation of Section 401(b). We conclude that it does not, for several reasons.

New England Telephone and Telegraph Co. v. Public Utilities Commission of Maine, et al., Docket No. 83-1779 slip. op. at 6 (June 29, 1984) (A-56).

The First Circuit found the FCC's preemption decision to be a "rule" and not an "order" within the meaning of §401(b). The court found that the decision fit the description of "rule" in the Administrative Procedures Act as "any agency statement of general . . . applicability and future effect designed to implement, interpret or prescribe law or policy . . ." 5 U.S.C. §551(4).

The First Circuit further held that only adjudicatory orders, and not rules, could be enforced by private parties under §401(b). The Court first relied on the APA definition of "order" which excludes final decisions in rulemaking proceedings. 5 U.S.C. § 551(6). (A-61). The Court also held that to apply 401(b) more broadly and permit private enforcement of rules would undermine manifest congresional intent that enforcement of the Communications Act be primarily entrusted to the FCC. *Massachusetts Universalist Convention v. Hildreth & Rogers Co.,* 183 F.2d 497, 500 (1st Cir. 1950); *Lechtner v. Brownyard,* 679 F.2d 322, 327 (3rd Cir. 1982). (A-62). Noting further that rules are often general in form, the First Circuit held that such a construction would place the interpretative function "in the hands of private parties and 700 federal district judges, instead of in the hands of the Commission. At best, responsibility for uniform policy would rest in the hands of an overworked (and inexpert) Supreme Court." *New England Tel.,* slip. op. at 12. (A-64).

The First Circuit also found that its construction of §401 (b) was essential to preserve procedural fairness to parties. Noting that review of the agency order for which enforcement is sought in a district court under 47 U.S.C. §401(b) is reserved to circuit courts of appeal under 28 U.S.C. §2342(1), the court stated:

> This "split" of power between circuit and district courts (leaving 'review' to the first and 'enforcement against the disobedient' to the second) makes a degree of sense where an 'adjudicatory' order is at issue, for the 'disobedient person' in such a case was likely a party to the order and might have sought review of the agency decision in the circuit court. It makes far less sense and is far less fair in the case of an agency rule, which might well be enforced against persons not parties to the rulemaking proceeding.
>
> *New England Tel.*, slip. op. at 14 (A-65).

47 U.S.C. §401(b) also requires that a party must fail or neglect to "obey an order" of the FCC before injunctive relief is available. Both common sense and federal jurisprudence dictate that to be in violation of an "order" one must have been directed to do or not do a certain act. 49 U.S.C. §16(12), (now repealed) was the forerunner of 47 U.S.C. §401(b). The cases decided pursuant to that statute required that the party sought to be enjoined must be in violation of an order or directive commanding the party to take or not take some action. *See, e.g., McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424 (2d Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966); *Interstate Commerce Commission v. Western N.Y. & P.R. Co.*, 82 F.192 (W.D. Pa. 1897).

The requirement that §401(b) apply only in situations where the defendant was actually a party to the proceeding that gave rise to the order or was actually directed to take some action in the order, is further supported by the jurisprudence interpreting the definition of "order" contained in the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, which provides:

> (6) "Order" means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but not including licensing;
>
> 5 U.S.C. § 551(6).

In defining an "order" as a "final disposition," Congress in-

tended that orders would have some specific consequences for the parties to the proceeding which gave rise to that order. This Court so found in *International Tel. & Tel. Corp. v. Local 134,* 419 U.S. 429, 95 S.Ct. 600, 42 L.Ed.2d 558 (1975).

The First Circuit's reasoning is directly applicable to the issues raised in the Arkansas PSC's petition. The Arkansas Commission was not a party to the FCC proceeding, the FCC's ruling had no "determinate consequences" for the Arkansas Commission and the FCC did not order the Arkansas Commission to do anything in its ruling. Therefore, the Arkansas Commission is not in "disobedience" of an FCC "order" and the decision of the Eighth Circuit Court of Appeals should be reversed.

CONCLUSION

For all the foregoing reasons, we respectfully urge this Court to issue a writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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